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IN THE
Supreme Court of the United States
October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

MOTION OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., AMERICAN BOOKSELLERS ASSOCIATION, INC. and NATIONAL ASSOCIATION OF COLLEGE STORES, INC. TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR REHEARING AND BRIEF ANNEXED

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Statement

The Association of American Publishers, Inc. (hereinafter referred to as "A.A.P."), the Council for Periodical Distributors Associations (hereinafter referred to as "C.P.D.A."), the International Periodical Distributors Association, Inc. (hereinafter referred to as "I.P.D.A."), the

Periodical and Book Association of America, Inc. (hereinafter referred to as "P.B.A.A."), the American Booksellers Association, Inc. (hereinafter referred to as "A.B.A.") and National Association of College Stores, Inc. (hereinafter referred to as "N.A.C.S.") (collectively referred to herein as "*Amici*") hereby seek leave of this Court to file a brief as *amici curiae* pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of the petition for rehearing filed by petitioner herein.

On July 2, 1973, counsel for the *Amici* wrote to Stanley Fleishman, Esq., counsel for petitioner, and to Burt Pineas, Esq., City Attorney of Los Angeles, California, counsel for respondent, requesting permission to participate as *amici curiae* in this proceeding. On July 5, 1973, counsel for petitioner granted such permission in writing. Counsel for respondent has not yet responded to the request.

The *Amici*

The Association of American Publishers, Inc. (A.A.P.) is a trade association organized under the laws of the State of New York. It is composed of publishers of general books, textbooks and educational materials. Its more than 260 members, which include many university presses and religious book publishers, publish in the aggregate the vast majority of all general, educational and religious books and materials produced in the United States. These works are distributed in thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities throughout the United States.

The Council for Periodical Distributors Associations (C.P.D.A.) is an Illinois not-for-profit corporation which has been in existence for fifteen years. It is the national association of 500 local independent wholesale distributors of magazines, comics, paperback books and newspapers in every state in the United States.

The International Periodical Distributors Association, Inc. (I.P.D.A.) is a trade association organized under the laws of the State of New York. It is an association of twelve national periodical distributors who are each in the business of distributing or arranging for the distribution of paperback books and periodicals throughout the United States for ultimate distribution to retailers and the public.

The Periodical and Book Association of America, Inc. (P.B.A.A.) is a New York not-for-profit association for magazines and paperback books, who share a common interest in the sale of their product through independent wholesaler distribution channels throughout the United States.

The American Booksellers Association, Inc. (A.B.A.) is a trade association organized under the laws of the State of New York. It is a national association representing 3,968 booksellers, including all of the major ones. The members consist of chain operations, private bookstores, department store book departments and university bookstores.

The National Association of College Stores, Inc. (N.A.C.S.) is a trade association organized under the

laws of the State of Ohio. It is composed of stores serving more than seven million college students and faculty. The N.A.C.S. has 2,250 members, of which 1,700 are owned by universities or colleges. The other 550 are privately sponsored.

Interest of the *Amici*

This petition is for a rehearing of those issues before the Court in the above-captioned proceeding and, by necessity, those issues determined by the Court in *Miller v. California* (No. 70-73, June 21, 1973) and *Paris Adult Theatre v. Slaton* (No. 71-1051, June 21, 1973). None of the materials in any of these cases was either published or disseminated by any member of the *Amici*.

The *Amici* join in this petition because of the broad impact of this Court's decisions in *Kaplan* and the companion cases upon which the decision in *Kaplan* was based. The *Amici* believe that these recent "obscenity" decisions subject their members and readers and, indeed, all citizens to violations of their First Amendment rights.

The *Amici* regret that they were not present before the Court as an *amici curiae*, either individually or collectively, in any of the above mentioned cases. They did not participate because the materials under consideration in these cases were not representative of the books and materials published and/or distributed by their members and they did not believe that the Court would undertake to establish entirely new guidelines for the definition and regulation of obscenity on the basis of the materials in the cases before it.

The *Amici*, therefore, seek permission to participate in this petition for rehearing so they may bring to the attention of the Court the problems inherent in the recent decisions. Despite the Court's expressed intention of regulating the dissemination of only "hard core pornography," the *Amici* submit that four rulings in the recently decided cases will intrude upon the publication and dissemination of constitutionally protected materials. They are: (1) that the "utterly without redeeming social value" test is deleted, (2) that determinations may be made on the basis of local as opposed to national standards, (3) that the prosecution need offer no expert evidence with respect to the three tests of *Miller*, but may merely place the material in question in evidence and (4) that as far as even reading materials are concerned, the zone of privacy recognized is no greater than the home.

The *Amici* believe that the newly announced tests and standards for determining obscenity are far more vague than their predecessors. As such, they fall short of the due process requirement of fair notice and they will have a severe chilling effect on the publication and dissemination of constitutionally protected literary works. Moreover, they are certain to result in a whole host of new obscenity litigation with which state and federal courts and this Court will surely be overwhelmed.

In light of the destructive impact that these decisions will have on First Amendment rights, the *Amici* urge the Court to grant the petition so that it may reevaluate the threshold issue—the demands of the First Amendment versus the interest of the States to control the "quality of

life," "total community environment" and the "tone of commerce"—with the assistance of factual information including statistics on publishing and distribution that the *Amici* and other affected groups can provide upon such a rehearing. Yet even if the Court should reaffirm its initial policy determination, the *Amici* urge the Court to grant the petition so it may clarify those aspects of the recent rulings which leave the present tests, standards and procedures for proceedings against "obscenity" vague to the point that the stated intention of the Court to isolate and regulate only "hard core pornography" will not be achieved.

In view of the foregoing, the *Amici* seek leave to file the brief following hereafter.

Respectfully submitted,

WEIL, GOTSHAL & MANGES
Attorneys for Amici

By /s/ EDWARD C. WALLACE

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AMICI CURIAE IN SUPPORT OF PETITION
FOR REHEARING**

Interest of Amici

This is set forth above in the motion to the Court.

Summary of Argument

1. The Court should reconsider the *Miller* test in light of its overbreadth and vagueness. The deletion of the "redeeming social value" test and the application of local as opposed to national standards will result in the suppression of constitutionally protected materials. Moreover, the *Miller* test creates serious problems of fair notice and it ignores the realities of the publishing and distributing process of most written materials.

2. Because of the inherent difficulties in isolating "obscene" materials from "non-obscene" materials, the Court should only permit regulation of the circumstances of the dissemination of sexually oriented materials to preclude exposure to minors and invasion of the privacy and sensibilities of unwilling adults. This approach will serve the States' interest to protect the "quality of life" and at the same time it will protect our constitutionally guaranteed freedom of expression.

3. The Court should, in the absence of a rejection of the *Miller* test, provide guidelines which clarify certain ambiguities in the June 21, 1973 decisions. To avoid abuse of the *Miller* test, the Court should clarify (1) the meaning of "local" standards, (2) the manner of determining "serious artistic, literary, political and scientific value" and (3) the nature of "conduct" that the States may proscribe and the manner in which that may be done.

ARGUMENT

POINT I

The vagueness and breadth of the *Miller* test clearly infringe upon constitutionally protected areas.

In remanding the *Kaplan* case to the State Court for further proceedings to determine whether the conviction is valid under the Court's tests in *Miller v. California*, this Court determined that all materials (including the printed word alone), and regardless of their manner of dissemination, are subject to the *Miller* test. That test is that the trier of fact must determine: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

Although the three prongs of the *Miller* test do not differ substantially in approach from the prior three-pronged test of *Roth v. United States*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), *Miller* does open the door for censorship of materials previously found to be entitled to First Amendment protection. In so doing, it aggravates the vagueness problem that has always surrounded attempts to define, isolate and regulate obscenity.

1. Deletion of the "utterly without redeeming social value" test

By determining that it is not constitutionally required for a work to be "utterly without redeeming social value" to be found "obscene," the Court has removed a test which provided a safeguard for those materials which some individuals might find "obscene" but which were clearly within the purview of the First Amendment. Substitution for that test with the *Miller* test that a work taken as a whole "lacks serious literary, artistic, political or scientific value" completely excludes from constitutional protection those materials containing sexual content which have philosophical, educational and/or entertainment value.¹ Much of what normal or average adults read, see at the movies and, indeed, watch on television arguably has no serious literary, artistic, political or scientific value. Yet, few would deny that such materials do have redeeming social value; they can be educational, entertaining, relaxing or otherwise rewarding to those individuals who voluntarily seek them out.

Indeed, the majority of this Court in the *Miller* case recognized this problem with respect to materials that the Court implies should not be found "obscene." In *Miller* (slip opinion at p. 11) the Court notes that we will have to rely on the jury system and traditional procedural safeguards to arrive at the proper decisions with respect to "medical books for the education of physicians and related personnel (which) necessarily use graphic illustrations and descriptions of human anatomy."

1. This is by no means an exhaustive list of areas which the Court excludes from constitutional protection.

The *Amici* submit that, if by the Court's own assessment of the *Miller* test, materials such as medical school textbooks are not clearly protected, it is clear that sex education materials published for and purchased by laymen are subject to censorship and likely to be banned in any number of communities. In excluding such materials from constitutional protection, the Court has veered far away from the underlying philosophy in the *Roth* decision. Based upon the Court's assertion in *Miller* that its goal is to isolate and control "hard core pornography" the *Amici* do not believe the Court meant to abandon a basic premise of *Roth* that "sex and obscenity are not synonymous." In *Roth*, the Court specifically noted that:

"Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind throughout the ages; it is one of the vital problems of human interest and public concern." (354 U.S. at 487)

Removing constitutional protection from sex education materials is clearly one of the problems with the new *Miller* test. While this Court has chosen to rely on the individual statements of a few of the dissenting members from the Commission on Obscenity and Pornography's Report as to the effect of sexually explicit materials on the tone of society, the *Amici* submit that no evidence, or indeed, documented arguments have been advanced to the effect that sex education materials, which in good part are published by religious book publishers, have any detrimental effect on public morality. Indeed, the evidence is quite to the contrary.²

2. See Part Three, Section III of the Report of the Commission on Obscenity and Pornography.

Apart from the whole category of professionally prepared sex educational materials, the *Miller* test places in jeopardy those works of fiction over which battles have long ago been fought and won. Not only is there now a serious question as to whether works by D. H. Lawrence, Henry Miller, James Joyce and, indeed, Rabelais and Boccaccio, to name a few, would be entitled to constitutional protection under the *Miller* test,³ but replacement of the "redeeming social value" test with the "serious literary, artistic, political or scientific" test leaves in doubt the status of many works which have not been tested, but as to which there has been little question as to merit or literary value. A principal reason for this confusion results from the fact that the Court in *Miller* implied that each jury could make a determination as to the literary, artistic, political or scientific value of a work and its seriousness simply by assessing the materials in question on the basis of the standards of their own communities.⁴

2. Use of local standards

This use of local standards raises the next disturbing aspect of the *Miller* test—that determinations of obscenity may be made by the jury applying local as opposed to national standards.⁵ By allowing local determinations of ar-

3. The weight to be applied to prior findings of constitutional protection of such works will be covered in Point III below.

4. Confusion with respect to the standard to be applied in determining whether a work has "serious artistic, literary, political or scientific value" will be discussed in Point III below.

5. In Point III below, the *Amici* will set forth the confusion resulting from the Court's failure to specify whether local standards must be State standards or whether they may be so local as to encompass countries, cities, towns, villages or neighborhoods.

tistic, literary, political and scientific value, the Court has, perhaps, inadvertently, embarked on a path which will result in the destruction of important aspects of American cultural life. It would indeed appear possible that some works of a Philip Roth or John Updike would be found to have serious literary value in one part of the country and not in another. If a national standard is not controlling as to these issues of literary criticism, some courts and juries in parts of the nation will deprive their residents of materials which have been found by nationally recognized literary critics as well as other courts and juries in other parts of the nation to be highly serious and significant. Not only will such communities be dictating moral standards to their residents, but they will be dictating intellectual standards as well.

In addition to the broad constitutional problems resulting from allowing some to impose moral and intellectual standards on others, the practices of the publishing and distributing industries are simply unable to accommodate a variety of standards among geographical sections of the country. For example, the materials published by members of the A.A.P. are disseminated on a national basis. Compliance with the standards of those communities which restrict access to sexually explicit materials will set the standard for materials published for all parts of the nation, including those communities which may determine that adults should be allowed access to a broad spectrum of sexually oriented materials. Hence, as far as books are concerned, the Court's belief (expressed in *Miller*, slip opinion at p. 18, fn. 13) that local community standards will not result in any greater suppression, and perhaps

less, in those communities where sexually explicit materials are acceptable is ill-founded.

Unlike local newspapers which can tailor their content to the community they serve and unlike films in which footage can be cut to satisfy community needs, books are printed in only one form.⁶ The contents of books cannot be modified, without prohibitive expense, to meet the varying standards of different communities. As a result, the only safe route for publishers to follow is to limit the sexual content of all their publications in such fashion that their works will not affront even the most restrictive of communities.

While the *Amici* require further time to assemble a complete statistical analysis of the manner in which most publications are distributed, at this juncture some statistics are available. The *Amici* urge the Court to grant this petition so that further concrete evidence may be presented. According to statistics gathered by the A.A.P. for 1972, the major trade book publishers distributed their products throughout the nation as a whole in the following manner: 43.5% were distributed by the publishers directly to bookstores throughout the country. Another 9% were distributed directly by the publishers to libraries and other institutions including schools, colleges and universities.

6. The special problem for book publishers has been recognized by the film critic Vincent Canby in *The New York Times*, "The Court's Impact on Movies," July 1, 1973, §2 (Arts and Leisure) at 28 in which he states:

"Book publishers will be in an even tougher situation since, although offending footage can be clipped from a movie print and later replaced, it's not possible to remove paragraphs temporarily from copies of a novel that might go against the grain in—say—the township of Pontoon in upper New York State."

41.6% were delivered to national wholesalers for distribution. With respect to the distribution of paperback books, approximately 75% were distributed by the publishers to wholesalers and approximately 25% were distributed directly by the publishers to outlets such as chain stores, bookstores and institutions.

Since the distribution of both trade and paperback books is divided between distribution directly to outlets and distribution to wholesalers, it is clear that distribution to accommodate local standards would require a total overhaul in the national distribution system. This affects not only the national publishers and distributors but the wholesalers and retailers as well. Arguing hypothetically that the standards of each community could be discerned *vis-à-vis* a given book prior to distribution, the distribution networks simply could not accommodate such decisions in any practical or economic fashion. The *Amici* submit, however, that national publishers, distributors and wholesalers will never be able to determine the acceptability of most books and materials in any community until after distribution has occurred.

Moreover, it is entirely impractical to assume that the local retailers are familiar with the content and character of all books distributed to them, whether by the publisher or wholesaler, to determine whether or not each title falls within the local community standards. Many bookstores carry tens of thousands of titles at a time. Moreover, while the approximately 11,000 bookstores in the United States⁷ are major outlets for books, it is now commonplace to

7. *American Book Trade Directory*, R. R. Bowker Company, 20th Ed. (1971-1972).

offer books for sale in numerous retail outlets whose primary business is the sale of merchandise other than books. The nominal book retailers must, therefore, rely entirely upon the judgment of others in deciding what books to carry.

And yet, it is this system of mass market distribution covering the entire United States that has created the opportunity to have paperback books distributed in millions of copies with the consequential public benefits of cheaper book prices and freer access to books. Undertaking all of the steps necessary to tailor distribution according to local standards (including legal expenses in trying to determine each local standard as well as business expenses required to restructure the system) would be so costly that the price of books will skyrocket and the public, as well as the publishers, distributors, wholesalers and retailers, would suffer.

Since a total restructuring of the mass marketing distribution system is virtually impossible, the publishers' only alternative is to tailor the contents of all of the materials they publish to the standards of the most restrictive communities in the nation. Consequently, this self-censorship will result in the most restrictive communities establishing *de facto*, if not *de jure*, the standard for the entire nation. The *Amici* submit that this result, which flows directly from the local standards holding of *Miller*, will result in the clear infringement of First Amendment rights.

Even prior to this Court's decision in *Miller*, the problems resulting from small groups dictating the content of materials to be read by others is apparent in the area of

textbook adoption. There are some 21 States in which the State determines what textbooks may be used in the school systems throughout that State. This sort of small group rule has been apparent in such broad areas as scientific and political content. Indeed, only a week ago a controversy over the direction of Arizona's public education flared into national prominence when the State Board of Education announced tentative approval of the following policy:⁸

"Textbook content shall not interfere with the school's legal responsibility to teach citizenship and promote patriotism. Textbooks adopted shall not include selections or works which contribute to civil disorder, social strife or flagrant disregard of the law."

In the response to opposition to this policy, its advocates have justified it as "morally correct."

Just as there is no place under the First Amendment for minority or indeed majority impositions of standards over the content of political materials which only foster thought and perhaps controversy, there should be no exception for the imposition by individuals of their own moral standards in the area of sex related materials. Yet, past experience shows that, particularly with respect to literary anthologies, textbook adoption will be an area in which claims of "obscenity" as to the content of some works included, will result in the suppression of whole anthologies. The *Amici* fear that the Court's recent rulings will only enhance the view, and hence the fact, that a few can make determinations for the many even as to materials which are clearly covered by the First Amendment guarantees. The textbook adoption situation is, we fear, an indication of the

8. *The New York Times*, July 7, 1973 §1 at 17.

treatment that adult reading materials will receive under the June 21, 1973 decisions.

The problems created by the *Miller* tests and the application of local standards, which have only been touched on lightly above, are those of overbreadth and vagueness. The *Amici* have only indicated the reasons for fearing a severe chilling effect resulting from these problems. They have not even touched upon the serious due process issues that result from the lack of notice and fair warning to those who will be criminally charged with the dissemination of materials which may now be encompassed by the *Miller* test and the heretofore unknown determinations of the community. In this regard, the *Amici* are persuaded that those aspects of the dissenting opinions of Justices Douglas and Brennan⁹ pointing to failure of the new tests to give the required "fair warning" raise issues which mandate further consideration.

In view of the foregoing, the *Amici* respectfully request that the Court grant the petition for rehearing and allow the *Amici*, as well as others, the opportunity to brief and document these points for consideration by the Court.

9. See *Miller*, dissenting opinion of Justice Douglas (slip dissent at pp. 5, 7) and *Paris Adult Theatre* dissenting opinion of Justice Brennan (slip dissent at pp. 14-18).

POINT II

The Court should allow the dissemination of sexually oriented materials to consenting adults in circumstances precluding exposure to minors and unwilling adults.

The Court in the *Miller* and its companion decisions has explicitly recognized that a fine line exists between protected and unprotected speech. In an effort to determine when speech falls short of First Amendment protection, the Court has in *Miller* proposed a three-pronged test. As shown above, this test is seriously deficient. Indeed, Justices Brennan, Marshall and Stewart have determined that the line cannot be drawn with the degree of definitiveness required to safeguard protected speech.

The *Amici's* failure to appear as an *amicus curiae* when these cases were heard by the Court was in large measure based on the belief that *Roth* and *Memoirs* did draw the line, if not clearly, at least safely in terms of First Amendment considerations. The recent decisions, both the majority and dissent, have caused the *Amici* to reevaluate their position. The *Amici* are persuaded that only the approach adopted by the minority of the Court will satisfy First Amendment commands.

To avoid the inherent difficulties surrounding the *Miller* approach to the obscenity problem, the *Amici* submit that the Court should abandon the *Miller* test and face the reality that it is impossible to define "obscenity" with such clarity that materials which fall within the protection of

First Amendment guarantees are not suppressed along with "obscene" materials. Accordingly, the *Amici* suggest that this Court solely allow regulation of the circumstances of dissemination to avoid exposure to minors and intrusion on the privacy and sensibility of adults offended by pandering and commercial promotion.¹⁰ This approach would sidestep the morass of problems caused by the most recent attempt, as well as all others, to separate out "obscene" materials in order to suppress them.

The *Amici* submit that the "obscenity problem" can be effectively controlled by application of the principles enunciated in this Court's decision in *Stanley v. Georgia*, 394 U.S. 557 (1969). In the *Stanley* decision, the Court recognized the right of an adult to read any book in the privacy of his home without interference by the State. The underlying premise of *Stanley* was this Court's desire to protect First Amendment rights from an unjustified intrusion of those rights by the State.¹¹ These rights include not only

10. The States may have an interest in limiting the area of dissemination of these sexually oriented materials so that minors are protected and the privacy of unconsenting adults is protected; legislation accomplishing these goals is easily drafted.

11. The Court in *Stanley* stated in pertinent part:

"It is now well established that the Constitution protects the right to receive information and ideas. * * * Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions in to one's privacy (394 U.S. at 564).

* * *

"Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any

(footnote continued on next page)

the right to read books, but the right to view films as well (394 U.S. at 565). The First Amendment specifically protects the individual's right to receive information and ideas (394 U.S. at 563). These rights are rights of people, not places. *Cf. Katz v. United States*, 389 U.S. 347, 351 (1967). These rights can best be protected by controlling the circumstance of dissemination of sexually explicit materials, rather than by outright suppression. The Court's recent limiting of *Stanley* as expressed in the recent rulings fails to abide by *Stanley's*, and indeed the First Amendment's, underlying philosophy. The *Amici* fully agree with and support the position taken by petitioner in Points 1a and 1b of the Petition for Rehearing to this effect.¹²

Stanley stands for the simple proposition that an adult should be free to peruse all types of expression whether it be obscene or not. In order to protect this fundamental right, the *Amici* submit that access to all types of expression be permitted within allowable bounds designed to protect minors and adults who would be offended by sexually oriented expression. This approach would serve a dual purpose: it would protect our fundamental First Amendment rights and, at the same time, allow the States to regulate intrastate commerce, protect the public environment and restrict the dissemination of sexually oriented materials

ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. * * * Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts" (394 U.S. at 566).

12. Although only Points 1a and 1b are mentioned in context, the *Amici* support the entire petition.

so that minors and non-consenting adults are fully protected.

The Court in the *Miller* opinion questions the practicality of this approach because (1) the avowed difficulty of determining which materials are subject to commercial regulation of any form still exists and (2) the Constitution does not distinguish between a willing "adult" one month past the State's legal age of majority and a willing "juvenile" one month younger. Neither of these criticisms affect the viability of this alternative.

The *Amici* concede that the difficulty of separating protected speech from unprotected speech still exists. However, the recommended alternative does not provide for suppression of unprotected speech, but simply for regulation of its commercial dissemination—zoning, if you will. Thus, protected speech which borders on the periphery of the First Amendment will not be suppressed. At most, an adult will have to make a conscious determination whether to view or hear the speech, but at least he will have the right to do so.

With respect to the second criticism raised by the Court, the *Amici* submit the police power of the State provides the necessary authority by which the State can distinguish between an "adult" and a "juvenile". The dichotomy between adult and juvenile has always been a matter of clear line-drawing. Thus, some States have enacted drinking laws which require that individuals be twenty-one in order to drink at a public place; others only require the individual to be eighteen. Similarly, statutory

rape laws determine when a female can consent to intercourse and when her consent will have no force. Indeed, State law determines when an individual can enter into a contract, be it marriage or otherwise, and when an individual needs parental consent. Thus, State law can clearly delineate between adults and minors in this area as well.¹³

Indeed, this Court has continually upheld the State's power to draw such lines. *Ginzberg v. New York*, 390 U.S. 629, 638 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1943). In the *Ginzberg* case, *supra*, New York State sought by legislation to prevent the sale of certain sexually oriented materials to minors under the age of 17. In finding §484-h of the Penal Law of New York constitutional, the Court said:

"The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in §484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature

13. For example, New York makes numerous distinctions as to rights, privileges and protections based upon age, in addition to those protections established for minors relating to the sale of indecent materials (§§235.20, 235.21 Penal Law (McKinney's 1967)). See, *e.g.*, §15 Domestic Relations Law (McKinney's 1964) prohibiting the marriage of males under the age of 16 and females under 14; §3-101 General Obligations Law (McKinney's 1964), permitting disaffirmance of contracts made by persons less than 18 years of age; §65 Alcoholic Beverage Control Act (McKinney's 1970) prohibiting the sale of any alcoholic beverage to a person under the age of 18; §150 Election Law (McKinney's Supp. 1972) requiring that a person be 21 years of age on Election day in order to vote; §501(b) Vehicle and Traffic Law prohibiting any person less than 18 years of age from obtaining a driver's license; §30.00(1) Penal Law (McKinney's 1967) stating that a person less than 16 years of age is not criminally responsible for his acts; §130.25, which makes intercourse with a female of less than 17 years a crime, and §130.05 which states that a person less than 17 years of age is incapable of consent to sexual conduct.

to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts, supra*, at 166, 88 L. Ed. at 652." (390 U.S. at 639)

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"The State also has an independent interest in the well-being of its youth." (390 U.S. at 640)

There can be no question that if it chooses, the State can distinguish between the "juvenile" and the "adult." The *Amici* therefore respectfully submit that the reasons presented by the majority of the Court to rebut the compelling arguments advanced by the dissenting Justices do not withstand further analysis.

POINT III

To achieve the goals as set forth by the Court in the recent decisions it must clarify its holdings by setting guidelines.

The decisions rendered in *Miller* and its companion cases have engendered tremendous confusion among educators, authors, publishers, distributors and law enforcement officials as to the meaning and proper implementation of this Court's three-pronged test. Failing a determination to reconsider the whole approach to the "obscenity problem" this Court should, at the very least, set specific guidelines

by which all affected groups can govern their future conduct. One need only read the newspapers or listen to radio or television to realize that the Court's decisions have been abused by law enforcement officials and that, because of the vagueness of certain aspects of the decisions, First Amendment freedoms have been severely undermined.

Within two weeks of this Court's rulings, the Georgia Supreme Court upheld the pornography conviction of a theater operator who showed the movie "Carnal Knowledge," an R-rated movie which received high critical acclaim.¹⁴ The rationale of the Georgia court was that the local community standards were the determining factors in deciding whether the material in question was obscene. Similarly, in Virginia the Albermarle County authorities ordered shopkeepers to remove magazines such as *Playboy* or *Penthouse* or face arrest. Similar precipitous actions by local authorities elsewhere, pointedly show the havoc created by the decisions.

The chaos created by the *Miller* decision among the affected groups who publish and distribute nationally has been documented by magazine and newspaper reports.¹⁵ Thus *Time Magazine*, July 2, 1973, states in its Law Section:

"That local standard rule could conceivably turn into a nightmare for publishers, film makers and other distributors of mass-circulation material. Robert Bernstein, head of Random House, sees the decision as 'a call to arms to every crazy vigilante group in this

14. *The New York Times*, July 4, 1973, §2 at 40; *Jenkins v. Georgia* (Georgia Supreme Court, July 2, 1973).

15. The newspaper and magazine articles referred to in this brief are only a representative sampling of the hundreds of news stories that appeared in the weeks following this Court's decisions.

country.' Michigan Attorney General Frank Kelley warns, 'This really sets us back in the dark ages. Now prosecuting attorneys in every county and state will be grandstanding, and every jury in every little community will have a crack at each new book, play and movie.'

"Many works will clearly be acceptable in some parts of the nation but not in others. Disparate rulings would force distributors into an uncomfortable choice—either bowing to the strictest law, forfeiting part of their business, or circulating various versions of a work. 'Community enforcement may result in hundreds of different film prints distributed around the country,' predicts Producer Russ Meyer, a creator of soft core nudie flicks. Producer-Director Stanley Kramer predicts that the decision could bring chaos to many movie companies; Irwin Karp, an attorney for the Authors League of America, said that publishers will be put under 'real restraints' " (at p. 45).

In seeking clarification of the rulings, the *Amici* merely highlight below certain questions on which answers are needed to effectuate the avowed purpose of *Miller* and to minimize the abuse of the Court's directions.

1. What are the local standards: state, county, city, town, or neighborhood?

In *Kaplan* this Court held that it was proper for the prosecution to offer evidence and for the Court to charge the jury with reference to standards of the State of California. Furthermore, in the second prong of the *Miller* test there is the requirement that the material prohibited be "specifically defined by the applicable state law." Moreover, in *Miller* the Court states: "To require a State to

structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility" (Slip opinion at p. 16, emphasis in original).

Despite these rather clear indicia that the Court intended to abandon a national standard in favor of State standards, the decisions have been construed by some groups to allow the creation of separate standards for each community within each State. The Court gave rise to this construction by stating in *Miller* that:

"It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City" (Slip opinion at p. 17).

The question arises as to whether local communities such as counties, cities and towns may enact ordinances prohibiting the depiction of certain sexual conduct which is permitted by the applicable State law. While efforts to draft and implement such local directives are already underway,¹⁶ the *Amici* believe that such a degree of fracturing and local determination was not intended by the Court. For, certainly the practical and accompanying chilling effect problems of varying State standards, as outlined in Point I above, would be magnified to incomprehensible proportions. The *Amici* submit that there is no way, short of distribution of only locally created materials, that reading or viewing materials can be tailored to satisfy the demands of each community. The *Amici*, therefore, urge the Court to clarify that only duly enacted State legisla-

16. In Albermarle County, Virginia, the commonwealth attorney has taken such steps. See *The New York Times*, July 4, 1973, §2 at 40.

tion may form the basis for obscenity proceedings within each State.

While a clarification that State legislation sets the outer limit for proceedings within each State will go far to clarify the issue as to the meaning of local standards, a further question remains. When judging materials before it in light of the applicable State law, must the jury base its determination on the existing State standards or may it judge the materials according to a more local standard? Here again, the *Miller* ruling holds that State standards are constitutionally adequate, yet there is an unresolved issue as to whether State standards—as opposed to local standards—are constitutionally required.

The *Amici* presume that the Court did not intend to allow juries sitting in different counties within the same State to judge the same or similar materials against varying standards. To allow such variation will amount to decisions being made in each case on the basis of the standards of the individuals on each jury. The consequence is, of course, no standard against which publishers, distributors and retailers can gauge materials even if they are familiar with the applicable State legislation. The due process and chilling effect problems raised by the dissenting Justices and touched upon in Point I above would be aggravated to crisis proportions.

The *Amici*, therefore, submit that the Court must clarify that local standards can be no more local than the fifty States with respect to both the controlling legislation and the community standard applying that legislation to the materials in question.

2. On what basis is a jury to determine whether a work has "serious artistic, literary, political or scientific value"?

The question posed above is not unrelated to the dilemma as to what standards a jury is to apply in making determinations. The Court specifically states in *Miller* (Slip opinion at pp. 15-16) that national standards as to "what appeals to the 'prurient interest' or is 'patently offensive' " are not required. It does not so specifically state with respect to assessments of "serious artistic literary, political or scientific value."

And yet, there are indications in *Miller* and its companion cases that local standards can constitutionally govern determinations of this third prong of the *Miller* test. In setting forth the three *Miller* tests, the Court notes that these must be "the basic guidelines for the trier of fact." (Slip opinion at p. 9). Furthermore in *Paris Adult Theatre* (Slip opinion at pp. 6-7), the Court held that the prosecution need not present evidence other than the material itself.

The *Amici* submit that it is untenable for juries to make determinations of "value" solely by viewing materials in the light of local standards. The question of value—even more than prurient appeal or patent offensiveness—is a question of law as well as fact. The question of value is one in which expert evidence is required and to which national standards must be applied. At the least, the *Amici* submit that expert evidence by the prosecution must be presented to rebut any such evidence offered by the defense on the issue of value. Moreover, no less than the usual strictures as to the weight to be given to any such evidence must be applied.

In this regard, the *Amici* urge the Court to clarify whether pre-*Miller* findings of constitutional protection for certain materials still have validity and, if not binding, whether they have probative weight. If this is not the case, the *Amici* predict that the courts will again be asked to determine whether the works of D. H. Lawrence, Henry Miller and others are still within the area of protected expression.

Moreover, a serious question exists as to whether in part (c) of the *Miller* test, the Court meant that allegedly obscene materials be evaluated solely on the basis of "serious literary, artistic, political or scientific" merit or whether the merits of the work can be measured in other areas such as educational, philosophical or entertainment terms as well. There is no question that a vast majority of the works disseminated in the mass media fields of television, radio and movies have no lasting value in any of the four areas categorized by the Court. Yet these works which are widely disseminated play an important role in the life of the general public. It is the rare television or radio script, whether the subject is sex or the Wild West, which is written for the purpose of contributing to the fields of literature, science, the arts or politics. The underlying goal of any script is to entertain the viewer. The *Amici* cannot believe that the Court meant to exclude from the consideration of whether a work is obscene, its value in areas other than the four listed in the *Miller* opinion.

In short, the *Amici* respectfully submit that the third prong of the *Miller* test requires greater clarification. As the opinions of the Court are now being interpreted, the

whole determination of value will be nothing more than a judgment based on the taste of the jurors. To prevent "reducing the rule of law to a matter of taste,"¹⁷ the Court should clarify that (1) national standards apply to this determination, (2) the determination must be made on available expert evidence, (3) prior findings of constitutional protection still control and (4) the value which protects sexual materials may encompass areas in addition to the artistic, literary, political and scientific.

3. What does "sexual conduct specifically defined by the applicable state law" mean?

The Court acknowledges in *Miller* that the permissible scope of regulation of obscene materials must be limited to works which depict or describe "sexual conduct" (Slip opinion at p. 9). Yet the Court goes on to suggest that it is possible for a State to include in its statute, the regulation of "lewd exhibition of the genitals." (Slip opinion at p. 11). The Court then takes a third position by saying:

"Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation * * *." (Slip opinion at p. 11).

Thus, the Court has in three pages offered three totally separate interpretations as to what a State can or cannot regulate. Under the opinion of the Court, it remains unclear whether a State by appropriate statute can regulate materials which deal with:

(a) sexual conduct between two or more participants; or

17. Petition for Rehearing, Point 3.

(b) exhibition of human genitals in a sexually aroused state; or

(c) depiction of the human body in its natural state.

The *Amici* urge the Court to clarify its position with respect to the above categories. Surely the Court recognizes that the undraped human form has been the subject of artistic creations throughout history in all forms of the literary, fine and performing arts. To allow States to regulate whether, for example, the unadorned female breast is obscene is to open the floodgates of repression with respect to all of the creative arts. The appreciation of the human form by photography or painting is in no way obscene. Yet the very words of this Court can be twisted to suppress such works.¹⁸

A second problem of construction with respect to test (b) of *Miller* has arisen. In reply to Mr. Justice Brennan's argument that the Court's decision in *Miller* will require complete redrafting of existing State "obscenity" legislation (*Paris Adult Theatre*, slip opinion fn. 12 at pp. 22-23), the Court states, "existing state statutes, as construed heretofor or hereafter may be adequate" to satisfy the constitutional tests enunciated in *Miller* (slip opinion fn. 6 at p. 9). The *Amici* are puzzled by this apparent invitation to prosecutors, judges and juries to determine whether, on an *ad hoc* basis, existing statutes, which clearly fail on their face to comply with the *Miller* test, can form the basis of constitutionally permissible proceedings. If this is what the Court intends, then the constitutional problems will be le-

18. Indeed, the wheels of repression under the banner of the *Miller* decision have already begun to turn. See pages 24-26, *supra*.

gion. In addition to the already highlighted problems of fair notice and the chilling effect on First Amendment rights, part (b) of the *Miller* test will also endanger the constitutional right to due process under the law as required by the Fourteenth Amendment and the constitutional protection against *ex post facto* laws.

The *Amici* respectfully urge the Court to clarify that (1) only sexual conduct and not mere depictions of the nude human body may be regulated and (2) that States may not use constitutionally deficient statutes in proceedings aimed at suppressing allegedly obscene material simply by adjusting construction to satisfy *Miller* on a case-by-case basis.

Conclusion

In view of the foregoing, the Association of American Publishers, Inc., Council for Periodical Distributors Associations, International Periodical Distributors Association, Inc., Periodical and Book Association of America, Inc., American Booksellers Association, Inc. and National Association of College Stores, Inc. respectfully request the Court (1) to grant the petition for rehearing, (2) to allow the *Amici* to participate in such rehearing, and (3) to reassess or, at least, clarify the prior rulings in this case and its companion cases.

Respectfully submitted,

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